STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK G. ATTEBURY,

Defendant-Appellant.

UNPUBLISHED
April 13, 1999

No. 197053
St. Clair Circuit Court
LC No. 96-000656 FH

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with a dangerous weapon, MCL 750.82; MSA 28.277, for which he was sentenced to two years' probation. We reverse and remand for a new trial.

I. Background Facts and Procedural History

On January 19, 1997, defendant approached his estranged wife in a shopping center parking lot. Defendant's wife testified that defendant then threatened to shoot her with a gun he was carrying. When defendant forced his way into the back seat of his wife's car, she fled. Police officers arrested defendant at his apartment two days later. When the officers arrived at defendant's apartment, defendant was taking a shower. While he clothed himself and before he was told that he had a right to remain silent pursuant to *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966), defendant was asked where the gun was located. Defendant initially told the officers that the gun was not in the apartment. After the officers again asked where the gun was, defendant responded that he had given the only gun he owned to his brother. The gun was subsequently recovered from defendant's brother.

Defendant filed a motion to suppress both the gun and the statement he made about the location of the gun. Defendant argued that because he was not given his *Miranda* warnings before making the incriminating statement, both the statement and the gun were inadmissible. At the *Walker*[1] hearing and again on the first day of trial, the prosecution argued that this evidence should be admitted under the

public safety exception to the *Miranda* rule. The trial court agreed, and denied defendant's motion to suppress. We hold that, under the circumstances of this case, the trial court's ruling was in error.

II. The Public Safety Exception

The public safety exception to the *Miranda* rule was first recognized in *New York v Quarles*, 467 US 649; 104 S Ct 2626; 81 L Ed 2d 550 (1984). In *Quarles*, the police were informed that a rape suspect who was armed with a gun had entered a nearby supermarket. The police entered the store and spotted the suspect near the checkout lanes. The suspect then ran toward the back of the store, where he was apprehended. A subsequent frisk revealed that the suspect was wearing an empty shoulder holster. When the police asked the suspect where the gun was, he "nodded in the direction of some empty cartons and responded, 'the gun is over there.'" *Id.* at 652. The trial court excluded the statement and the gun because the defendant had not been given his *Miranda* warnings. The trial court's decision was upheld on appeal to the Appellate Division of the Supreme Court of New York. *Id.* at 652-653.

In reversing the exclusion of the evidence in *Quarles*, the United States Supreme Court held "that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved." *Id.* at 655-656. The *Quarles* Court further observed:

> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. . . .
>
> The police in this case . . . were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. . . .
>
> Here, had *Miranda* warnings deterred Quarles from responding to [the] . . . question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarels. [The officer] . . . needed an answer to his question not simply to make his case against Quarels but to insure that further danger to the public did not result from the concealment of the gun in a public area. [*Id* at 656-657.]

In the case at hand, the situation the police were confronted with was markedly and significantly different from the situation that the *Quarels* Court felt justified an exception to *Miranda*. Here, the police were not confronted with an immediate threat to the public. Defendant was arrested by three police officers in his home two days after the incident in the parking lot. When the police encountered defendant, he was taking a shower. According to the police, defendant was cooperative and unthreatening. There is no evidence that the police had any indication that the gun was located in a

place where it was endangering the public. Under these circumstances, we conclude that the police were not confronted with a situation where they had to make a split second decision between giving the *Miranda* warnings and neutralizing a volatile danger to the public safety. *Id.* at 657-658. In fact, apparently the situation was so unthreatening that the police allowed defendant to finish his shower and dress before taking him into custody.

This situation is similar to that in *Orozco v Texas*, 394 US 324; 89 S Ct 1095; 22 L Ed 2d 311 (1969), where the Court found that the defendant's admissions about the location of a gun "was a flat violation of the Self-Incrimination Clause of the Fifth Amendment[2] as construed in *Miranda*." *Id.* at 326. "In *Orozco* four hours after a murder had been committed at a restaurant, four police officers entered the defendant's boardinghouse and awakened the defendant, who was sleeping in his bedroom." *Quarles, supra* at 659 n 8. "After being asked a second time where the pistol was, [the defendant] . . . admitted that it was in a backroom of the boardinghouse." *Orozco, supra* at 325. In *Quarles*, the Supreme Court stated that the holding in *Orozco* "is in no sense inconsistent with our disposition of the case." *Quarles, supra* at 659 n 8. "In short," the *Quarles* Court continued, in *Orozco* "there was no exigency requiring immediate action beyond the normal need expeditiously to solve a serious crime." *Id.*

Simply put, the type of exigent circumstances that justify the application of the narrowly tailored public safety exception to the *Miranda* rule are not present in the case at hand.[3] As was the case in *Orozco*, we believe that the questioning of defendant was clearly investigatory and did not relate in any way to an objectively reasonable concern for the public safety. *Id.* Therefore, we hold that defendant's statement that the gun was located at his brother's home was erroneously admitted into evidence because it was obtained in violation of the rule of *Miranda*. We further hold that the admission of the gun was also an error, given that its discovery was the illegal fruits of the *Miranda* violation. *Orozco, supra* at 326.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] US Const, Am V reads in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." Michigan's constitutional protection against self-incrimination is found at Const 1963, art 1, § 17: "No person shall be compelled in any criminal case to be a witness against himself . . . ."

[3] The application of the public safety exception depends upon the totality of the circumstances involved. The mere fact the challenged questioning centers on the location of a weapon is not by itself dispositive.

If there is no indication that the public safety is somehow specifically endangered—as opposed to a generalized notion that all weapons pose a threat to the public safety—then the public safety exception does not apply. Compare *Quarles, supra* at 658-659 with *Orozco, supra* at 325-327.